PHUAR KONG SENG

v.

LIM HUA

HIGH COURT MALAYA, SHAH ALAM
ZALEHA ZAHARI J
[ORIGINATING SUMMONS NO: 3-24-1606-2003]
29 DECEMBER 2004

COMPANY LAW: *Meetings - Calling of meetings - Power of High Court to order a meeting - Circumstances where such power may be exercised - Companies Act 1965, s. 150*

This concerned the plaintiff's application pursuant to s. 150 of the Companies Act 1965 ('the Act'), for *inter alia* an order that he be at liberty to call an Extraordinary General Meeting ('EGM') and to appoint one Ng Sook Wah as director, if appropriate. The plaintiff and defendant were directors and respectively owned 51% and 49% of shares in Chemfert Sdn Bhd. The plaintiff contended that the defendant had set up another company – Agrowangsa Sdn Bhd – dealing with substantially the same business as Chemfert. The plaintiff further alleged that the defendant had failed to attend previous EGM's and such failures resulted in the quorum provisions being incapable of being complied with. The plaintiff submitted that for Chemfert to function, it was necessary to appoint an additional director. The defendant in opposing the application, claimed that if additional directors were appointed, the defendant would no longer have the power to veto. The defendant further admitted that Agrowangsa Sdn Bhd was established by his son and held out documentary evidence to show that Agrowangsa's business had been conducted on an arms length basis. The defendant further alleged minority oppression by the plaintiff.

Held (allowing the plaintiff's application substantially):

[1] Section 150 of the Act confers upon the High Court the power to order a meeting, if for any reason it is impracticable to call a meeting in any manner in which a meeting may be called or to conduct a meeting in the manner prescribed by the Articles or the Act. In such a situation, the court may either on its own motion or on the application of any director or member entitled to vote at the meeting, order a meeting to be held in such manner as the court thinks fit. The court may also give such ancillary or consequential directions as it thinks expedient. (pp 479 h & 480 a)

[2] Quorum provisions cannot be regarded as conferring a form of veto on a minority party in a situation where a deadlock exists. In the instant case, the proposed resolutions involved the interests of the plaintiff and the defendant qua shareholders. As such shareholders they were free to exercise their voting rights to advance their own self-interest. (p 482 b-c)

[3] Although the defendant admitted that Agrowangsa was his son's business, the fact that the defendant was in a position to hold out documents of Agrowangsa was very significant. The situation had clearly given rise to a conflict of interest. The subsequent conduct of the defendant in declining to sign cheques of Chemfert was also not without significance. (p 482 d-e)

[4] With regard to the allegations of minority oppression by the defendant, it was open to the defendant to institute separate proceedings. The court would take note of the fact that the defendant had not instituted such proceedings. Taking into account all the facts and circumstances, the court would hold that it was impracticable to call for a meeting of Chemfert in the manner prescribed by its articles of association or the Act. Without the court's intervention, Chemfert could not function. (p 482 e-f)

Legislation referred to:
Companies Act 1965, s. 150

For the plaintiff - CM Loo; M/s Abu Hassan & Assocs
For the defendant - Cik Azian; M/s Pathma Nalli & Partners

Reported by Andrew Christopher Simon

JUDGMENT

Zaleha Zahari J:
By this application the managing director and majority shareholder of Chemfert Sdn Bhd ("Chemfert"), is seeking for an order that he be at liberty to call an Extraordinary General Meeting (EGM) of Chemfert one week from the issuance of the order to consider, and if it deems appropriate, that one Ng Sook Wan be appointed a Director of Chemfert. Further, that the one week's notice with respect to the purpose of the EGM be given to the respondent or his solicitor and that if the respondent fails to attend the said EGM, the plaintiff, by himself attending the meeting, shall be deemed to constitute a meeting.

The Law
Section 150 of the Companies Act 1950 ("the Act") confers upon the court power to order a meeting if for any reason it is impracticable to call a meeting in any manner in which meeting may be called or to conduct a meeting in the manner prescribed by the articles or the Act.

In such a situation the court may either on its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or the personal representative order a meeting to be called, held and conducted in such manner as the court thinks fit and may give such ancillary or consequential directions as it thinks expedient including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.

It is now incumbent upon me to set out the facts and circumstances presented before the court in the consideration of whether this was an appropriate case warranting the exercise of the power of the court conferred by s. 150 of the Act.

Background

The grounds of the application are as set out in the affidavit of the plaintiff affirmed on 31 December 2003 [encl. (2)], that of Boo Thiam Koon affirmed on 13 February 2004 [encl. (4)], and that of Tan Chee Kian affirmed on 12 March 2004 [encl. (5)] whilst that in opposition is that affirmed by the defendant on 30 March 2004 [encl. (7)] and that affirmed on 20 May 2004 [encl. (7A)].

From the affidavits filed in support and in opposition to the application it is common ground that the plaintiff and the defendant were the only shareholders of Chemfert, ie, the plaintiff owning 51% whilst the defendant owns 49%. It is also not in issue that all of the cheques and the operation of the banking facilities of Chemfert requires both the plaintiffs and defendant's signatures.

The plaintiff's contention is that, the defendant had set up another company, Agrowangsa Sdn Bhd ("Agrowangsa"), which is dealing in substantially the same fertiliser business as Chemfert. The plaintiff's contention is that upon the setting up of Agrowangsa the defendant had diverted some of Chemfert's customers to Agrowangsa which was accordingly detrimental to Chemfert.

The plaintiff highlighted the attempts to hold several EGM of Chemfert, ie, firstly, pursuant to notices in exh. "P8", secondly that pursuant to notice in exh. "P9" encl. (2), and that the defendant had failed to attend these two meetings. According to the plaintiff the defendant had also failed to attend the meeting called pursuant to notice in exh. "P15".

The plaintiff's counsel submitted that the continued non-attendance of the defendant at meetings pursuant to notices properly issued had resulted in the quorum provisions being incapable of being complied with which has resulted in a deadlock situation. In such a situation it was submitted on behalf of the plaintiff that it was impracticable to call and conduct a meeting in the manner

prescribed by the articles or the Act and that this was an appropriate case for the exercise of the power conferred upon the court by s. 150. It was submitted that for Chemfert to function it was necessary and the plaintiff was proposing to appoint an additional director for Chemfert.

The plaintiffs counsel also submitted that the reason advanced by the defendant for non-attendance of the EGM called and in opposing this application as contained in para. 26 of the defendant's affidavit in encl. (7), that if additional powers were to be appointed the defendant would no longer has the power to veto, is not a valid reason in not allowing this application and should be rejected by the court. Counsel for the plaintiff submitted that it is a basic principle of company law that the majority rule prevails.

As to the defendant's allegations of misuse of power levelled against the plaintiff, the plaintiff's counsel submitted that it was necessary for the defendant to institute separate proceedings which the defendant had failed to do. He was of the view that this court should not to go into the affairs of the Chemfert unless brought before the court by way of separate proceedings.

In his affidavit in reply the defendant admitted that his son had established the company, Agrowangsa and that Agrowangsa is also involved in the fertiliser business. Be that as it may the defendant took issue that Agrowangsa was marketing exactly the same products as Chemfert and averred that the target group and clientele of Agrowangsa and Chemfert was not the same. The defendant held out documents of Agrowangsa as evidence in support to show that the business of Agrowangsa had been conducted on an arms length basis.

The defendant also denied to diverting dealings of Chemfert to Agrowangsa. As to the non-signing of cheques of Chemfert, the defendant admitted to not signing the same, the reason being, because he was doubtful of the *bona fideness* of the transactions in issue. The defendant alleged that the plaintiff, as managing director of Chemfert, had acted *mala fide* and had abused his power.

The defendant averred that he has been prejudiced by the defendant's actions. The defendant also alleged that he would be prejudiced should this application be allowed by the court as he would be losing his right to veto. The defendant also alleged that he had been oppressed as a minority shareholder of Chemfert.

In these circumstances the defendant's counsel urged the court to dismiss the plaintiff's application with costs.

Findings

It is a basic principle of company law that the corporate will is advanced by resolution of the company in general meeting in matters in which the general meeting is competent to act and that the majority of members controls the decision making in the company by the exercise of its voting power. A related principle is that voting rights are in the nature of property and members may exercise this power in their own interest.

I am in agreement with the submission of the plaintiff's counsel that the quorum provisions cannot be regarded as conferring a form of veto on a minority party in a situation where a deadlock exists. The proposed resolutions involved the interests of the plaintiff and the defendant qua shareholders and as such shareholders they are accordingly free to exercise their voting rights to advance their own self-interest.

As to admission of the defendant that his son had established a company which is also involved in the fertiliser business as Chemfert, and statement of non-involvement in the affairs of his son's business, the fact that the defendant was in a position to hold out documents of the Agrowangsa is in my view very significant. I am in agreement that this situation has given rise to a conflict of interest situation. The subsequent conduct of the defendant in declining to sign cheques of Chemfert in the normal course of the running of business was certainly not without significance. Likewise the non-attendance of meetings called pursuant to the notices validly issued giving rise to this deadlock situation.

As to the allegation of being oppressed as a minority shareholder, it was open for the defendant to institute separate proceedings and the court took note of the fact that the defendant had not instituted such proceedings to date.

I am satisfied taking into consideration all of the facts and circumstances of this case that it was impracticable to call for a meeting of the Chemfert in the manner prescribed by its articles of association or the Act. The company, Chemfert, clearly cannot function without the intervention of the court.

I accordingly allowed the application and granted an order in terms of prayers 1 and 3. I also directed that 14 days notice be given to the defendant and the defendant's solicitors of such meeting. On the issue of costs, although prayed for in the application, in view of the applicant's counsel not claiming costs in his submission, I accordingly directed that each party bear their own costs.